

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Z-Tel Communications, Inc.

Complainant

v.

**Illinois Bell Telephone Company,
d/b/a Ameritech Illinois**

Respondent

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Docket No. 02-0160

**REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF
THE ILLINOIS COMMERCE COMMISSION TO THE ADMINISTRATIVE LAW
JUDGE'S PROPOSED ORDER ON REHEARING**

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October 29, 2002

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Now comes the Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorneys, and, pursuant to Section 200.830 of the Commission’s Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits its Reply Brief on Exceptions to the Administrative Law Judge’s Proposed Order On Rehearing (“ALJPO” or “Proposed Order”) issued on October 18, 2002. Briefs on Exceptions were filed by Illinois Bell Telephone Company d/b/a Ameritech Illinois (“Ameritech BOE”) and Z-Tel Communications, Inc. (“Z-Tel BOE”).

I. Z-TEL’S EXCEPTIONS

Z-Tel takes exception to the ALJPO’s conclusions regarding its request for additional information, but does not offer any detailed reasoning or alternative language. Accordingly, Staff submits that Z-Tel’s exceptions should be denied.

II. AMERITECH'S EXCEPTIONS

Ameritech contests the Proposed Order's conclusions with respect to the penalty issue. Ameritech does not, in Staff's view, raise new arguments in this regard. Thus, Staff's supports the conclusions reached by the Administrative Law Judge in the Proposed Order for the reasons stated in Staff's prior briefs. However, Staff will respond to certain arguments raised by Ameritech.

Ameritech contends that Section 13-516(a)(2) provides "that a carrier's first violation of Section 13-514 would not result in civil penalties." Ameritech BOE at 2. Based on this assertion, Ameritech argues that that the Proposed Order's allowance of penalties under Section 13-305 of the PUA for Ameritech's violation of Section 13-801 would render this aspect of Section 13-516(a) meaningless. *Id.* Ameritech's argument lacks merit. First, Section 13-516(a)(2) is not worded as a prohibition as suggested by Ameritech (i.e., that a first violation must not result in civil penalties), but instead is worded as a grant of authority ("for a second and any subsequent violation of Section 13-514 . . . , the Commission may impose penalties . . . "). 220 ILCS 5/13-516(a)(2). Thus, although Section 13-516(a)(2) does not provide for the assessment of penalties for a carrier's first violation of **Section 13-514**, the language of Section 13-516 does not evidence a legislative intent to prohibit or supplant any other penalties -- particularly penalties authorized under a different Section of the PUA, here, Section 13-304.

Second, the Proposed Order does not render this language meaningless, even if one accepts Ameritech's improper reading of the meaning of that language. In this regard, Ameritech asserts that "[i]t is difficult to conceive of a Section 13-514 violation that would not violate some other provision of the Act, or of the rules or orders of the

Commission.” *Id.* at fn. 1. Staff does not share Ameritech’s view that it is inconceivable that an ILEC could take (or fail to take) some action that would “impede competition” contrary to Section 13-514, but which would not explicitly violate some other provision of the PUA. Further, Ameritech’s argument ignores that carriers are not required to bring an action under Section 13-514. Thus, it is entirely conceivable that a carrier could assert an action under Section 10-108 for a violation of a provision of the PUA that could also form the basis for an action under Section 13-514. Ameritech’s position – that penalties cannot be granted where a claim could have been made (or was made in the alternative) under Section 13-514 – would render Sections 10-108 and 13-305 meaningless. Indeed, Ameritech has taken the position in this proceeding that Z-Tel could have filed this whole proceeding under Section 10-108:

MR. KERBER: Just to add to that briefly, they choose their procedural path. They could have filed this whole thing under 10-108.

* * *

If Z-Tel had chosen to do so they could have proceeded under 10-108 and given themselves all the time they wanted.

Tr. at 36-37.

Ameritech also takes issue with the conclusion that its argument is illogical and unjust because it would disallow the imposition of penalties for a violation of Section 13-801. Ameritech BOE at 3. Ameritech contends that it “argues only that its first offense is free from penalties.” *Id.* Even accepting Ameritech’s position at face value, Staff disagrees that an unjust and unfair result somehow becomes just and fair if it will only occur once. Further, the underlying premise of Ameritech’s argument is that penalties under Section 13-305 can not be granted where they could also be granted under Section 13-516. This internal inconsistency demonstrates the erroneous nature of

Ameritech's claim. As to the General Assembly's intent, the General Assembly did not in Section 13-516 prohibit the imposition of penalties generally or specifically with respect to Section 13-305.

Ameritech also argues that the Proposed Order is incorrect because Section 13-305 provides that it applies "in a case in which a civil penalty is not otherwise provided for in this Act" Ameritech BOE at 4. Staff's agrees with the Proposed Order's finding that "Ameritech attempts to blur Section 13-801 and Section 13-514, after having been found to have violated both Sections." Proposed Order at 10. Ameritech's argument ignores the fact that the Commission is not imposing a penalty for violation of Section 13-514 – but rather for Ameritech's violation of Section 13-801. Thus, there is no penalty "otherwise provided for in this Act" for the direct violation of Section 13-801.

Ameritech also attacks the Proposed Order's analysis of Section 13-801(k). Contrary to Ameritech's assertions, Staff's submits that the Proposed Order's analysis and reasoning are both logical and consistent with legislative intent. It is Ameritech that has ignored the limitations of its own argument. Further, Staff does believe that Section 13-801(k) is necessarily mandatory in the sense that Ameritech considers it mandatory. Section 13-801(k) provides that "[t]he Commission shall determine any matters in dispute between the incumbent local exchange carrier and the requesting carrier pursuant to Section 13-515 of this Act." 220 ILCS 5/13-801(k). This section does not state that "actions for a violation of Section 13-801 must be brought under Section 13-515 as a violation of Section 13-514." Staff submits that this language simply mandates the Commission consider violations of Section 13-801 pursuant to Section 13-515 when filed as such. Further, Section 13-515 is permissive and provides that "[a]

telecommunications carrier may file a complaint with the Commission alleging a violation of Section 13-514 in accordance with this subsection". 220 ILCS 5/13-515(d). Further, it is inconsistent with the overall goals and intent of HB 2900 to interpret Section 13-801(k) as limiting the availability of procedures and remedies available to carriers for violations of the PUA.

Finally, although not argued specifically, Ameritech proposes that the Proposed Order be modified (if the decision on penalties is changed in favor of Ameritech) to provide for the payment of 50% of the attorney's fees on rehearing. Even if the Commission revised the Proposed Order's conclusion on penalties, this aspect of Ameritech's proposal should be rejected. Z-Tel has prevailed on its claim under Section 13-514, and even if penalties were found to be inapplicable, that does not change the fact that Z-Tel has prevailed. The law in Illinois regarding fee shifting is that the failure to prevail on all claims is not a basis to reduce an award of attorney's fees. See *J.B. Esker & Sons, Inc. v. CLE-Pa's Partnership*, 325 Ill. App. 3d 276, 281-282 (1st Dist. 2001) ("The fact that the court ruled in plaintiff's favor on some issues does not create a basis for a reduction in the award of attorney fees."); *Uresic v. Department of Human Services*, 331 Ill. App. 3d 871, 892 (1st Dist. 2002) ("[F]ee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit"). Accordingly, Ameritech's proposed change is improper and should be denied.

III. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that the Administrative Law Judge's

Proposed Order On Rehearing, with the changes noted in Staff's Brief on Exceptions,
be presented for approval to the Commission.

Respectfully submitted,

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